

§ 230.166 Exemption from section 5(c) for certain communications in connection with business combination transactions.

PRELIMINARY NOTE: This section is available only to communications relating to business combinations. The exemption does not apply to communications that may be in technical compliance with this section, but have the primary purpose or effect of conditioning the market for another transaction, such as a capital-raising or resale transaction.

(a) *Communications.* In a registered offering involving a business combination transaction, any communication made in connection with or relating to the transaction before the first public announcement of the offering will not constitute an offer to sell or a solicitation of an offer to buy the securities offered for purposes of section 5(c) of the Act (15 U.S.C. 77e(c)), so long as the participants take all reasonable steps within their control to prevent further distribution or publication of the communication until either the first public announcement is made or the registration statement related to the transaction is filed.

(b) *Definitions.* The terms business combination transaction, participant and public announcement have the same meaning as set forth in § 230.165(f).

[64 FR 61450, Nov. 10, 1999]

§ 230.167 Communications in connection with certain registered offerings of asset-backed securities.

PRELIMINARY NOTE: This section is available only to communications in connection with certain offerings of asset-backed securities. The exemption does not apply to communications that may be in technical compliance with this section, but have the primary purpose or effect of conditioning the market for another transaction or are part of a plan or scheme to evade the requirements of section 5 of the Act (15 U.S.C. 77e).

(a) In an offering of asset-backed securities meeting the requirements of General Instruction I.B.5 of Form S-3 (§ 239.13 of this chapter) and registered under the Act on Form S-3 pursuant to § 230.415, *ABS informational and computational material* regarding such securities used after the effective date of the registration statement and before the sending or giving to investors of a

final prospectus that meets the requirements of section 10(a) of the Act (15 U.S.C. 77j(a)) regarding such offering is exempt from section 5(b)(1) of the Act (15 U.S.C. 77e(b)(1)), if the conditions in paragraph (b) of this section are met.

(b) *Conditions.* To rely on paragraph (a) of this section:

(1) The communications shall be filed to the extent required pursuant to § 230.426.

(2) Every communication used pursuant to this section shall include prominently on the cover page or otherwise at the beginning of such communication:

(i) The issuing entity's name and the depositor's name, if applicable;

(ii) The Commission file number for the related registration statement;

(iii) A statement that such communication is *ABS informational and computational material* used in reliance on Securities Act Rule 167 (§ 230.167); and

(iv) A legend that urges investors to read the relevant documents filed or to be filed with the Commission because they contain important information. The legend also shall explain to investors that they can get the documents for free at the Commission's Web site and describe which documents are available free from the issuer or an underwriter.

(c) This section is applicable not only to the offeror of the asset-backed securities, but also to any other participant that may need to rely on and complies with this section in communicating about the transaction. A participant for purposes of this section is any person or entity that is a party to the asset-backed securities transaction and any persons authorized to act on their behalf.

(d) Failure by a particular underwriter to cause the filing of a prospectus described in this section will not affect the ability of any other underwriter who has complied with the procedures to rely on the exemption.

(e) An immaterial or unintentional failure to file or delay in filing a prospectus described in this section will not result in a violation of section 5(b)(1) of the Act (15 U.S.C. 77e(b)(1)), so long as:

(1) A good faith and reasonable effort was made to comply with the filing requirement; and

(2) The prospectus is filed as soon as practicable after discovery of the failure to file.

(f) Terms used in this section have the same meaning as in Item 1101 of Regulation AB (§229.1101 of this chapter).

[70 FR 1615, Jan. 7, 2005]

§ 230.168 Exemption from sections 2(a)(10) and 5(c) of the Act for certain communications of regularly released factual business information and forward-looking information.

PRELIMINARY NOTES TO § 230.168. 1. This section is not available for any communication that, although in technical compliance with this section, is part of a plan or scheme to evade the requirements of section 5 of the Act.

2. This section provides a non-exclusive safe harbor for factual business information and forward-looking information released or disseminated as provided in this section. Attempted compliance with this section does not act as an exclusive election and the issuer also may claim the availability of any other applicable exemption or exclusion. Reliance on this section does not affect the availability of any other exemption or exclusion from the definition of prospectus in section 2(a)(10) or the requirements of section 5 of the Act.

3. The availability of this section for a release or dissemination of a communication that contains or incorporates factual business information or forward-looking information will not be affected by another release or dissemination of a communication that contains all or a portion of the same factual business information or forward-looking information that does not satisfy the conditions of this section.

(a) For purposes of sections 2(a)(10) and 5(c) of the Act, the regular release or dissemination by or on behalf of an issuer (and, in the case of an asset-backed issuer, the other persons specified in paragraph (a)(3) of this section) of communications containing factual business information or forward-looking information shall be deemed not to constitute an offer to sell or offer for sale of a security which is the subject of an offering pursuant to a registration statement that the issuer proposes to file, or has filed, or that is effective,

if the conditions of this section are satisfied by any of the following:

(1) An issuer that is required to file reports pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d));

(2) A foreign private issuer that:

(i) Meets all of the registrant requirements of Form F-3 (§239.33 of this chapter) other than the reporting history provisions of General Instructions I.A.1. and I.A.2.(a) of Form F-3;

(ii) Either:

(A) Satisfies the public float threshold in General Instruction I.B.1. of Form F-3; or

(B) Is issuing non-convertible securities, other than common equity, and meets the provisions of General Instruction I.B.2. of Form F-3 (referenced in 17 CFR 239.33 of this chapter); and

(iii) Either:

(A) Has its equity securities trading on a designated offshore securities market as defined in Rule 902(b) (§230.902(b)) and has had them so traded for at least 12 months; or

(B) Has a worldwide market value of its outstanding common equity held by non-affiliates of \$700 million or more; or

(3) An asset-backed issuer or a depositor, sponsor, or servicer (as such terms are defined in Item 1101 of Regulation AB (§229.1101 of this chapter)) or an affiliated depositor, whether or not such other person is the issuer.

(b) *Definitions.*

(1) *Factual business information* means some or all of the following information that is released or disseminated under the conditions in paragraph (d) of this section, including, without limitation, such factual business information contained in reports or other materials filed with, furnished to, or submitted to the Commission pursuant to the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*):

(i) Factual information about the issuer, its business or financial developments, or other aspects of its business;

(ii) Advertisements of, or other information about, the issuer's products or services; and

(iii) Dividend notices.